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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)

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Cellular Communications of Puerto Rico's)
Petition for Declaratory Ruling, or in the)
Alternative, for Rulemaking to Hold an)
Auction to License Cellular RSA)
No. 727A, Ceiba, Puerto Rico)
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RM-8897

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Federal Communications Commission
Washington, D.C. 20554

To: The Commission

COMMENTS OF TME CELLULAR PARTNERS

Pursuant to Section 1.405 of the Federal Communications Commission's ("FCC" or "Commission") Rules,¹ TME Cellular Partners ("TME") respectfully submits these Comments in response to the Commission's Invitation for Public Comment on "Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling or Rulemaking to Determine whether Competitive Bidding Procedures Should be Used to License Certain Cellular Rural Service Areas."²

Statement of Interest

TME is an applicant for cellular Rural Service Area (RSA) licenses in the following markets: Arkansas 9 - Polk RSA (Market No. 332 A), Florida 11 - Monroe RSA (Market No. 370 A), Minnesota 11 - Goodhue RSA (Market No. 492 A), North Dakota 3 - Barnes RSA (Market No. 582 A), and Pennsylvania 4 - Bradford RSA (Market No. 615 A). The

¹ 47 C.F.R. § 1.405.

² Public Notice, DA 96-1685, released October 24, 1996.

rights of all applicants for each of the licenses could be affected by the Commission's action on this petition for rulemaking. Accordingly, TME has standing to file these comments.

Background

On July 12, 1996, the FCC issued a Public Notice³ announcing that it would hold a lottery in the Domestic Public Cellular Telecommunications Service for RSA Markets in which the previous lottery winner was defective. The Public Notice set the lottery for Wednesday, September 18, 1996. The FCC proposed to hold a lottery for licenses in six cellular RSAs, RSA markets 332A, 370A, 492A, 582A, 615A, and 727A. On September 9, 1996, Cellular Communications of Puerto Rico, Inc. ("CCPR") filed a Petition for Declaratory Ruling or, in the Alternative, for Rulemaking requesting that the unserved area license in market 727A - Ceiba, Puerto Rico be awarded through the competitive bidding process rather than through the lottery process. On September 10, 1996, the FCC released another public notice postponing the RSA license lottery, giving no reason.⁴ On October 24, 1996, the FCC issued yet another public notice, this time seeking comment on CCPR's Petition for Declaratory Ruling.⁵

COMMENTS

I. By law, applications filed before July 26, 1993 are to be licensed by lottery.

TME's license applications are entitled to a random selection process because the

³ Public Notice, Lottery Notice, 63896, released July 12, 1996.

⁴ Public Notice, Lottery Notice 65051, released September 10, 1996.

⁵ Public Notice, Cellular Communications of Puerto Rico, Inc., Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Cellular Rural Service Areas, DA 96-1685, released October 24, 1996.

applications were filed in 1988 and 1989, when licensees for rural service areas were determined by lottery from among the applications accepted for filing by the FCC. At the time TME's applications were accepted by the FCC, TME had no notice that it would not receive fair treatment under the Commission's rules as written. In 1993, when the Omnibus Budget Reconciliation Act⁶ granted the FCC authority to choose licensees using the competitive bidding process, it implied that applications filed prior to July 26, 1993 should not be subject to auctions. The Budget Act contained a special provision in section 6002(e) which stated:

SPECIAL RULE. -- The Federal Communications Commission shall not issue any license or permit pursuant to section 309(i) of the Communications Act of 1934 (47 U.S.C. 309(i)) [Random Selection] after the date of enactment of this Act unless -

- (1) the Commission has made the determination required by paragraph (1)(B) of such section (as added by this section); or
- (2) one or more applications for such license were accepted for filing by the Commission before July 26, 1993.

47 U.S.C § 309(i) (1993).

Following adoption of the Budget Act, the FCC adopted an order which specified that cellular applications filed prior to July 26, 1993 would continue to be issued by lottery.⁷ The Commission's decision to use lotteries to choose among the applications filed prior to July 26, 1993 was based on its belief that "the Congressional intent and the public interest would best

⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. §§ 309(j) and 332), hereinafter the "Budget Act".

⁷ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 7387 (1994) in which the FCC decided that cellular unserved area licenses, for which applications were filed prior to July 26, 1993 should be awarded by lottery. (*Unserved Areas Order*).

be served by using the statutory lottery procedures. . ."⁸ The Commission noted that the cellular applicants had already incurred substantial delays in having their applications considered.⁹ The Commission further reasoned that equitable concerns and administrative cost and efficiency concerns justified the use of lotteries for those applicants who, in reliance of the Commission's existing lottery procedures, filed applications prior to July 26, 1993.¹⁰ In light of the fact that all other licenses for cellular rural service areas and for cellular unserved areas, for which applications were filed prior to July 26, 1993, have been awarded by lottery, it is appropriate to hold a lottery to choose among the RSA applications currently on file. In fact, most of the cellular unserved area licenses filed prior to July 26, 1993 were sent to a lottery on November 21, 1995. TME's applications have been pending for eight years, more than four years before any of the March 10, 1993 filing window unserved area license applications were filed. It would be inequitable to treat these cellular applications differently than later-filed applications subject to the same rules. Furthermore, to change the licensing approach at this point in time would treat similarly situated parties differently. Such conduct by the FCC is arbitrary and capricious and is prohibited by the *Ashbacker* doctrine.¹¹ Clearly, the FCC cannot conduct an auction for these markets in violation of its rules and the Ashbacker doctrine.

⁸ *Id.* at 7390.

⁹ *Id.*

¹⁰ *Id.* at 7391.

¹¹ Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945).

II. Retroactive application of auction rules to these license applications is inappropriate.

TME's applications are entitled to be evaluated under the FCC's rules as written when the applications were filed. In McElroy Electronics v. FCC, 990 F.2d 1351 (D.C. Cir. 1993), the court held that the FCC's attempt to impose newly created filing procedures on applications timely filed under existing rules was impermissible, and it reinstated the applications. Whereas in McElroy, the FCC was relying on a footnote to alert the public that the rules might someday change -- a reliance that the court found unacceptable -- here, TME had no inkling when it filed its RSA applications that it could face selection through the competitive bidding process. To impose an auction this late in the game would be fundamentally unfair. TME and the other RSA applicants filed cellular area applications for consideration under FCC rules in 1988 and 1989. Delay in processing and litigation have caused the markets to remain unlicensed for eight years. That delay is not due to any action on the part of TME, and TME should not be made to suffer for delay it did not cause. The cost of participating in an auction is high, and after the changes this industry has seen in the seven years or more since these applications were filed, it is even less reasonable for the FCC to impose greater burdens on TME and other similarly situated applicants. McElroy, at 1358.

Now, because the FCC is seeking to enhance revenues, rather than to protect the public interest by seeing service provided expeditiously and treating these applicants fairly, the FCC is again delaying licensing these areas, preventing permanent service to the RSAs for months, perhaps even years, longer than necessary. This delay of service is clearly not in the public interest. In the *Unserved Areas Order*, the Commission found that licensing of

unserved areas would be more expeditious if it held lotteries.¹² The minimum time assumed necessary for an auction was 60 days to prepare, in addition to the time of the auction. Experience has shown since 1994 that the Commission generally needs 75 days to prepare for an auction, and that the auction process itself normally lasts three months or more. These RSA licensees could be selected by lottery before the end of 1996, and the licenses could be issued not long after that. In light of the eight year delay which the applicants have had to endure already, imposition of auctions would both disserve the public and unfairly harm these RSA applicants.

The Commission's reliance on CCPR's argument that the *Unserved Areas Order* and the Budget Act allowed the FCC discretion to choose to auction or lottery the licenses is misplaced. CCPR's legal argument is not supported by the language of the Budget Act.¹³ Moreover, because other licenses were issued by lottery, it would be fundamentally unfair for the FCC to license unserved cellular areas for which applications were filed prior to July 26, 1993 in any way but by lottery.

III. CCPR's petition is an untimely Petition for Reconsideration.

If the FCC were to auction these RSA licenses, it would be acting in violation of the provisions of the *Unserved Areas Order*.¹⁴ In effect, CCPR's petition is an untimely request for reconsideration, in violation of Section 405 of the Communications Act and in violation of Section 1.117 of the Commission's Rules which requires that reconsideration of Commission

¹² *Unserved Areas Order*, 9 FCC Rcd at 7392.

¹³ 47 U.S.C. Section 309(i), note 1, (1993).

¹⁴ *Unserved Areas Order*, 9 FCC Rcd 7387 (1994).

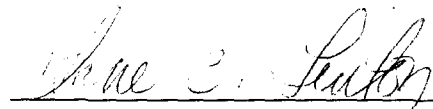
action be sought within 30 days of that action if the petitioner is an interested party, and within 40 days if the FCC is acting on its own motion.¹⁵ For this reason alone, CCPR's Petition should have been rejected by the FCC.

For the foregoing reasons, CCPR's Petition should be rejected and the cellular lotteries rescheduled, post-haste.

Respectfully submitted,

TME CELLULAR PARTNERS

By:



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November 25, 1996

¹⁵ See 47 U.S.C. § 415, 47 C.F.R. § 1.117.

Certificate of Service

I, Caroline Hill, an employee of the Law Offices of Bennet & Bennet, PLLC, certify that on this 25th day of November, 1996, I mailed by United States mail, postage prepaid, a copy of the foregoing "Comments of TME Cellular Partners" following:

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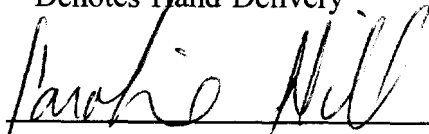
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